

United States  
Circuit Court of Appeals  
For the Ninth Circuit.

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DAVE CULJAK,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

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Transcript of Record.

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Upon Appeal from the United States District Court for  
the Western District of Washington,  
Southern Division.

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FILED

JUN 23 1931

PAUL P. O'BRIEN,  
CLERK



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Circuit Court of Appeals  
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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Commr. #2363—Kuljak.  
2367—Nicholson.

C.-198.

Bail \$1000 ea.

Wn. #11,067.

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\*Page-number appearing at the foot of page of original certified  
Transcript of Record.

District Court of the United States, Western District of Washington, Southern Division.

July, 1930, Term.

No. 14,304.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVE KULJACK, *alias* DAVE CUJAK, FOREST W. NICHOLSON,

Defendants.

### INDICTMENT.

Vio. Secs. 3 and 21, Title II, Act of October 28, 1919 (National Prohibition Act).

United States of America,  
Western District of Washington,  
Southern Division,—ss.

The grand jurors of the United States of America being duly selected, impaneled, sworn, and charged to inquire within and for the Southern Division of the Western District of Washington, upon their oaths present: [2]

### COUNT I.

That DAVE KULJACK, *alias* Dave Cujak, whose true Christian name is to these grand jurors unknown, on the seventeenth day of October, in the year of our Lord one thousand nine hundred and thirty, at Aberdeen, Grays Harbor County, in the Southern Division of the Western District of Wash-



ington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully and unlawfully sell certain intoxicating liquor, to wit, approximately Two (2) Ounces DISTILLED SPIRITS, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said DAVE KULJACK, *alias* Dave Culjac, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [3]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

#### COUNT II.

That FOREST W. NICHOLSON, on the third day of November, in the year of our Lord one thousand nine hundred and thirty, at Aberdeen, Grays Harbor County, in the Southern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully, and unlawfully sell certain intoxicating liquor, to wit, approximately One-half ( $\frac{1}{2}$ ) Pint and Three (3) Ounces DISTILLED SPIRITS, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for bever-

age purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said FOREST W. NICHOLSON, as aforesaid, was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [4]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

### COUNT III.

That DAVE KULJACK, *alias* Dave Cujak, whose true Christian name is to these grand jurors *aforesaid*, on the twenty-second day of November, in the year of our Lord one thousand nine hundred and thirty, at Aberdeen, Grays Harbor County, in the Southern Division of the Western District of Washington, and within the jurisdiction of this court, then and there being, did then and there knowingly, wilfully, and unlawfully sell certain intoxicating liquor, to wit, approximately One-half ( $1\frac{1}{2}$ ) Pint and Three (3) Ounces DISTILLED SPIRITS, then and there containing more than one-half of one per centum of alcohol by volume and then and there fit for use for beverage purposes, a more particular description of the amount and kind whereof being to the said grand jurors unknown, and which said sale by the said DAVE KULJACK, *alias* Dave Cujak, as aforesaid, was

then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America. [5]

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

#### COUNT IV.

That DAVE KULJACK, *alias* Dave Cujak, whose true Christian name is to these grand jurors unknown, and FOREST W. NICHOLSON, and each of them, beginning on or about the seventeenth day of October, 1930, and continuing to and including the twenty-second day of November, in the year of our Lord one thousand nine hundred and thirty, at Aberdeen, Grays Harbor County, in the Southern Division of the Western District of Washington, and within the jurisdiction of this Court, and at a certain place known as the Aberdeen Cigar Store and Lunch Counter situated at No. 316 South G Street, Aberdeen, then and there being, did then and there and therein knowingly, wilfully, and unlawfully conduct and maintain a common nuisance by then and there manufacturing, keeping, selling, and bartering intoxicating liquors, to wit, DISTILLED SPIRITS, and other intoxicating liquors containing more than one-half of one per centum of alcohol by volume and fit for use for beverage purposes, and which said maintaining of such nuisance by the said —————, as aforesaid,

was then and there unlawful and prohibited by the Act of Congress passed October 28, 1919, known as the National Prohibition Act; contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States of America.

ANTHONY SAVAGE,

United States Attorney.

JOSEPH A. MALLERY,

Asst. United States Attorney. [6]

[Endorsed]: A true bill.

A. G. PRICHARD,

Foreman.

[Endorsed]: Presented to the Court by the Foreman of the Grand Jury in open court, in the presence of the Grand Jury, and filed in the U. S. District Court, Jan. 22, 1931.

ED M. LAKIN,

Clerk. [7]

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### COPY OF JOURNAL RECORD.

At a regular session of the District Court of the United States for the Western District of Washington, held on January 31, 1931, at Tacoma, in the Southern Division of said District, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had, were the following, truly taken, and correctly copied from the Journal Record of said court as follows:

[Title of Cause.]

ARRAIGNMENTS, PLEAS, ORDER FOR  
TRIAL.

On this day defendants with H. S. Garvin as counsel are in court and arraigned. Each enters a plea of Not Guilty and trial of this cause is set for February 17, 1931. [8]

---

DEMURRER.

Come now the defendants and each of them by and through their attorney, H. Sylvester Garvin, and respectfully demur that all of the counts in the said indictment are not sufficient at law to compel the defendants hereto to answer, and demur to all of said counts and to the indictment for the following reasons:

I.

That the court has no jurisdiction of the person of the defendants or the subject matter therein contained.

II.

That several crimes have been improperly united.

III.

That said indictment and all of the counts thereto do not state facts sufficient to constitute a crime.

H. SYLVESTER GARVIN,  
Attorney for Defendants.  
955 Dexter Horton Building,  
Seattle, Washington.

Received a copy of the within demurrer this 4 day of Feb., 1931.

JOS. A. MALLERY,  
Attorney for \_\_\_\_\_.

[Endorsed]: Filed Feb. 4, 1931. [9]

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### MOTION TO QUASH INDICTMENT.

Come now the defendants, and each of them, and allege that there is a misjoinder of parties defendant in this, that in Count I of said indictment Dave Kuljack is charged with the sale of intoxicating liquor; in Count II Forest W. Nicholson is charged with the sale of intoxicating liquor; in Count III Dave Kuljack is charged with the sale of intoxicating liquor; and in Count IV Dave Kuljack and Forest W. Nicholson and each of them are charged with maintaining a common nuisance at 316 South G Street, Aberdeen, Washington; that the said offenses charged in said four counts are separate and distinct from each other, complete in themselves, not part of the same transaction, independent of each other and not provable by the same evidence and that the defendants are placed in such a position by reason of the consolidation of the charges in the said indictment that they cannot have a fair and impartial trial and that the said consolidation of charges and joinder of defendants as in this indictment alleged, is illegal and improper.

H. SYLVESTER GARVIN,  
Attorney for Defendants.

Received a copy of the within Mo. to Quash this  
5 day of Feb., 1931.

JOSEPH A. MALLERY,  
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 5, 1931. [10]

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COPY OF JOURNAL RECORD.

At a regular session of the District Court of the United States for the Western District of Washington, held on February 9, 1931, at Tacoma, in the Southern Division of said District, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had, were the following, truly taken, and correctly copied from the Journal Record of said court as follows:

[Title of Cause.]

HEARING ON DEMURRER AND MOTION TO  
QUASH.

On this 9th day of February, 1931, H. S. Garvin appears on behalf of defendants and argues the demurrer to the indictment, which demurrer is overruled and exception allowed. The motion to quash is also argued and denied and exception allowed. Defendants are to plead at time of trial.

[11]

## COPY OF JOURNAL RECORD.

At a regular session of the District Court of the United States for the Western District of Washington, held on February 27, 1931, at Tacoma, in the Southern Division of said District, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had, were the following, truly taken and correctly copied from the Journal record of said court as follows:

[Title of Cause.]

## PLEAS OF DEFENDANTS AND RECORD OF TRIAL.

On this 27th of February, 1931, Mr. Mallery for the Government and the defendants with H. S. Garvin as their attorney are in court and each defendant enters a plea of Not Guilty. [12]

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VERDICT.

We, the jury empaneled in the above-entitled cause, find the defendant, Dave Culjak, Not Guilty as charged in Count I of the Indictment filed herein; and further find the defendant, Dave Culjak, is Guilty as charged in Count IV of the Indictment filed herein; and further find the defendant Forest



W. Nicholson is guilty as charged in Count IV of the Indictment filed herein.

E. W. JENSEN,  
Foreman.

[Indorsed]: Filed Mar. 3, 1931. [13]

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COPY OF RECORD FROM JUDGMENT AND  
DECREE JOURNAL.

At a regular session of th District Court of the United States for the Western District of Washington, held on March 9, 1931, at Tacoma, in the Southern Division of said District, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had were the following, truly taken and correctly copied from the Judgment and Decree Journal of said court as follows:

No. 14304.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

DAVE CULJAK et al.,

Defendants.

JUDGMENT AND SENTENCE (DAVE  
CULJAK).

On this 9th day of March, 1931, defendant Dave Culjak comes into open court in his own proper person for sentence, and being informed by the Court of the charges against him in this cause

and of his conviction of record herein, he is asked whether he has any legal cause to show why sentence should not be pronounced and judgment had against him at this time, he nothing says save as he before hath said.

WHEREFORE, by reason of the law and the premises, it is by the Court CONSIDERED, ORDERED AND ADJUDGED that defendant Dave Culjak is guilty of the crime of maintaining and conducting a common nuisance in violation of Section 21, Title II, Act of October 28, 1919, (National Prohibition Act), and that it is the judgment and sentence of the Court that defendant Dave Culjak be imprisoned on Count IV of the Indictment for a period of Ten Months, the place of imprisonment to be at the Federal Road Camp at Fort Lewis, Washington, until such time as the Attorney General of the United States shall designate some other place as the place of imprisonment. And by the further judgment and sentence of the court defendant is ordered to pay to the United States such costs of prosecution as are taxable against him in this cause. And the said defendant Dave Culjak is now committed to the custody of the Attorney General of the United States and the Superintendent of the Federal Road Camp at Fort Lewis, Washington, his authorized representative to execute this sentence and is now ordered remanded into the custody of the United States Marshal for delivery to the Superintendent of the Federal Road Camp at Fort Lewis, Washington. It is further ordered that commitment be stayed to 2 P. M., March 23, 1931.

MOTION FOR A NEW TRIAL.

Come now the above-named defendants, and each of them, and move the Court for an order granting to them a new trial in the above-entitled cause for the following reasons:

I.

Irregularity in the proceedings of the court, jury and the plaintiff, and in the orders of the court by which the defendants were prevented from having a fair trial.

II.

Misconduct of the plaintiff and jury.

III.

Accident and surprise which ordinary prudence could not have guarded against.

IV.

Newly discovered evidence material for the defendants which they could not, with reasonable diligence, have discovered and produced at the trial.

V.

Insufficiency of the evidence to justify the verdict of the jury, and that such verdict is against law.

VI.

Error in law occurring to trial and excepted to at the time by the defendants.

H. SYLVESTER GARVIN,

Attorney for Defendants,  
955 Dexter Horton Building,  
Seattle, Washington.

Received a copy of the within Mo. for new trial this 5 day of March, 1931.

JOS. A. MALLERY,  
Attorney for \_\_\_\_\_.

[Indorsed]: Filed Mar. 6, 1931. [15]

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### COPY OF JOURNAL RECORD.

At a regular session of the District Court of the United States for the Western District of Washington, held on March 9, 1931, at Tacoma, in the Southern Division of said District, the Honorable EDWARD E. CUSHMAN, United States District Judge presiding, among other proceedings had, were the following, truly taken, and correctly copied from the Journal record of said court as follows:

[Title of Cause.]

### HEARING ON MOTION FOR NEW TRIAL, ETC.

On this 9th of March, 1931, Mr. Mallery for the Government, and H. S. Garvin appearing on behalf of defendants, argue the defendants' motion for new trial, which motion is denied and each defendant allowed an exception. [16]

ORDER EXTENDING TIME TO MAY 25, 1931,  
FOR APPELLANT TO PREPARE HIS  
RECORD AND LODGE HIS APPEAL.

This matter coming duly and regularly before the court upon the appellant's motion for an order extending time, and the court being fully advised in the premises,—

IT IS HEREBY ORDERED AND ADJUDGED that the appellant's time be extended to May 25, 1931, within which to serve and lodge his bill of exceptions upon his appeal in the Circuit Court of the United States for the Ninth Circuit.

Dated this 28th day of March, 1931.

EDWARD E. CUSHMAN,  
United States District Judge.

Received a copy of the within order this 28th day of March, 1931.

JOHN T. McCUTCHEON,  
Attorney for Pltff.

[Endorsed]: Filed Mar. 28, 1931. [17]

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BILL OF EXCEPTIONS.

BE IT REMEMBERED that on the 27th day of February, 1931, at the hour of 4:10 o'clock P. M., the above-entitled and numbered cause came on for trial before the Honorable EDWARD E. CUSHMAN, one of the Judges of the above-entitled court, sitting in the above-entitled court, at the Federal

Building, in the City of Tacoma, County of Pierce and State of Washington; the plaintiff appearing by its attorney, Mr. Joseph A. Mallery, Assistant United States District Attorney, and the defendants appearing by their attorney, Mr. H. Sylvester Garvin; both sides having announced they were ready for trial; a jury was then and there duly empaneled and sworn to try said cause. Mr. Mallery then made an opening statement of the plaintiff's case to the jury, and

WHEREUPON the following proceedings were had and testimony given, to wit:

Mr. GARVIN.—Now, if your Honor please, at this time the defendants and each of them renew their demurrer that they filed, and renew their motion to quash; and object to any testimony from any of the Government witnesses on any of the counts in this indictment, and particularly to counts,—that is another motion. I will also, in an additional motion, I also object to any testimony [18—1] under counts two and three for the additional reason that the face of the counts of those in the indictment, shows that if a crime was committed, that it is passed by the statute of limitations.

Mr. MALLERY.—No objection to the motion on counts two and three.

The COURT.—Well, the demurrer?

Mr. GARVIN.—I want to say frankly to the Court, I did not argue my last motion in my demurrer because I had assumed I had not read the original. I thought it was correct, until I checked it here in court the other day, when your Honor

called to my attention another count in another case.

The COURT.—Now, your statute of limitations, you are addressing to which count?

Mr. GARVIN.—The third, count three, if your Honor please. The word was stricken out, and I think it says 1920, if I am not mistaken.

The COURT.—Well, then, you are just demurring to the third count?

Mr. GARVIN.—No. I am demurring to all of the counts, if your Honor please, and to the misjoinder of the parties defendant.

The COURT.—Well, the demurrer,—you object to evidence because of the statute of limitations?

Mr. GARVIN.—Particularly as to counts two and three, but I am still renewing my general demurrer to the whole indictment.

The COURT.—Motion to quash denied, and demurrer overruled. Objection sustained to the introduction of any evidence in support of counts two and three.

Mr. GARVIN.—And, if your Honor please, I will be allowed an exception to the court's ruling as to counts one and four, and to my motion to quash?

The COURT.—Exception allowed. [19—2]

Mr. GARVIN.—Very well.

The COURT.—You say that the court called your attention to that?

Mr. GARVIN.—If your Honor please, if you recall, we started to plead somebody here the other day your Honor said, "I don't think that count is good," and it was just similar to that one. So then

I went and we changed the plea and plead to another count, then. I looked this one up, I think it was Wednesday.

The COURT.—It may be that the court was reading the count. I don't recall any statement that the court ever made volunteering that the count was not any good.

Mr. GARVIN.—We had entered a plea of guilty to a count similar to that and your Honor questioned it on account of the dates, and then your Honor, we withdrew that and entered it as to a different one.

The COURT.—The court may have read the date, but the court disclaims ever having volunteered any statement that any count was not a good count. It does not care to be estopped. You may proceed with the examination.

#### TESTIMONY OF DEWEY HARRISON, FOR THE GOVERNMENT.

DEWEY HARRISON, having been first duly sworn as a witness on behalf of the Government, testified in substance as follows:

That his name is Dewey Harrison and he is a Federal Prohibition Agent. I had occasion to see the defendant Culjack on October 17, 1930. (Witness identified Culjack.) He is the first man behind Mr. Garvin, the one in the middle. About nine o'clock on the night of the 17th of October, 1930, informer Fritz Erickson and I went to the Aberdeen Cigar Store, 316 South "G" Street, Aberdeen, Washington. We walked in and Mr. Culjack and



(Testimony of Dewey Harrison.)

another man were sitting in a chair close to the stove. Erickson and myself walked on back to the toilet, and came right out. As we passed, Erickson spoke to [20—3] Dave and said "Hello," and when we came back Mr. Culjack looked up and said, "Do you want something?" and Fritz said "Yes," so Mr. Culjack walked to the front of the place and went behind the lunch-counter and came back from that side and walked in a small room, just a partitioned room. There wasn't any top over it,—just a square partition,—and then he let us through the south door of this partitioned room.

He had a square bottle of moonshine whiskey and he served us a drink each, and the informant paid fifty cents for it; and I said, "Give us another round," and so he served two more rounds, and I gave him a dollar, and he put it in his pocket and returned with fifty cents change. Then we left the place. That was October 17th.

I saw the defendant Culjack on November 22, 1930, at about 8:30 P. M. With Agent Robinson, Informer Erickson and myself, we returned to the Aberdeen Cigar Store, Aberdeen, Washington.

Mr. GARVIN.—If your Honor please, I object to this testimony under this count, apparently this is count number three. If they are attempting to offer proof under count number four instead, I object to it on the ground that there is no proper foundation shown for it.

Mr. MALLERY.—It is offered under count four, your Honor.

(Testimony of Dewey Harrison.)

The COURT.—Objection overruled.

Mr. GARVIN.—Exception, if your Honor please.

The COURT.—Allowed.

WITNESS—(Continuing.) We entered the place and Mr. Culjack and Mr. Nicholson were there. We asked Dave for liquor and he walked around behind the bar and entered this partitioned room and let us in through this south door of the partitioned room. He had a quart bottle of moonshine whiskey in his hand. He served three ounces, Agent Robinson, Erickson and myself. Agent Robinson paid him [21—4] seventy-five cents. I then ordered a pint, and Mr. Culjack started out the door, and I discovered I didn't have the money, and so I told him to bring a "mickey."

Mr. GARVIN.—I move to strike that portion of the answer, "I discovered I didn't have the money," as not being responsive to the question,—not responsive to any question put to him, and not being material.

The COURT.—Motion denied.

Mr. GARVIN.—Exception.

The COURT.—Allowed.

WITNESS.—(Continues.) Mr. Culjack left the partitioned room, and shortly returned and handed me a half pint of moonshine. I gave him one dollar. Mr. Robinson was talking to Mr. Nicholson about some fishing lines or some fishing poles, or something like that, that he had helped him rig up, or fix up, or rig up some other day. (Witness identified Government's Exhibit Number One.) That is

(Testimony of Dewey Harrison.)

a half pint of moonshine whiskey that I purchased from Mr. Culjack on the 22d day of November, the one I have just testified about. It contains moonshine whiskey, intoxicating, capable of being used as a beverage, and contains more than one-half of one per cent of alcohol by volume. The cigar store where this transpired, is in the Western District of Washington. The bottle was kept in my possession and then turned over to Agent Rainey on December third.

Mr. MALLERY.—I offer Government's Exhibit Number One in evidence.

Mr. GARVIN.—I object to the label that is on it, if your Honor please.

The COURT.—It will be admitted. The Clerk is directed to cover the label so it cannot be read, and the jury is instructed to not remove the covering or attempt in any way to read or decipher the label. [22—5]

Mr. GARVIN.—Your honor, I object to it also, on the additional ground, as to the whole exhibit, that there has been no proper foundation laid for the admissibility of it. There is no showing at all on behalf of the Government to show who owned, operated or conducted this place. It is an additional attempt to prove a misdemeanor that they are attempting to prove under count four, by the act of a felony.

The COURT.—Well, you should not have made all your objections at one time, but the court does not care to be technical. Objection sustained, as

(Testimony of Dewey Harrison.)

long as the witness says it was turned over to Mr. Rainey. It has not been traced.

Mr. GARVIN.—Well, if your Honor please, I am not objecting on the grounds,—I don't wish to delay the trial, or anything like that. I am not objecting to it on the ground that Mr. Rainey,—well, I will admit it was turned over to Mr. Rainey.

The COURT.—You admit the identity?

Mr. GARVIN.—Yes, of the bottle; but I object to it on the attempt to prove count four, which is a misdemeanor, by the felony, though,—the sale of liquor.

The COURT.—Objection overruled.

Mr. GARVIN.—Exception.

The COURT.—Allowed.

(Whereupon bottle referred to was received in evidence and marked Government's Exhibit 1.)

Witness identifies Government's Exhibit Number Two as a half pint of liquor Agent Robinson turned over to him, and described the premises.

On cross-examination he testified that he went there about 9 P. M. on October 17; that he was certain of the date from examining his notes; that the notes were made on or before midnight of October 17th and that he had referred to the notes several times [23—6] since then, including the last day or so. He stated that he was testifying from his notes as to the dates and hours and from his memory as to what took place. He did not think he had any independent recollection of the time other than the notes and that by reason of his

(Testimony of Dewey Harrison.)

notes would not think it could have occurred about noontime. That he could not remember from the fact that it was daylight and that he had no independent recollection of the time and supposed that there was electric lights there just like in any other place; that had there been any gaslights or anything different than electric lights he would have noticed it and believed he was just as sure of that as of any other thing that he testified to in the case. He had no definite recollection of a particular kind of lights in the room except that he knows it wasn't dark in the room. As he remembers the incident, there were not twenty lights in the room.

He stated Erickson went up and spoke to Culjack who was sitting at a table between the stove and right wall and he doesn't remember who the other party was that was with Culjack. That he had made some eighty or ninety investigations during the time he was in Aberdeen and that each of them practically involved three or four transactions; that he had been in Aberdeen from August 7 until the present time; that about half the arrests made at Aberdeen were on December 1st and that the balance was made from then on to the present time; that he assisted in making the arrests but did not secure the warrants from the Commissioner. That when they walked into the store Erickson spoke to Culjack and he and Erickson walked into the toilet and came right back. Culjack asked Erickson if they wanted something. Erickson said yes and Culjack walked to the front of the place behind the

(Testimony of Dewey Harrison.)

lunch-counter and came down to the partitioned room. We could hear him open a door and then he opened another one, the south door, and let us in. He had a bottle of moonshine whiskey in his [24—7] hand and served us some liquor. I don't know where he got the bottle. We remained long enough to transact the sale. Erickson paid for two drinks and I paid for two. They were fifty cents apiece. I furnished the money to Erickson. I distinctly remember it was a quart bottle and I remember Culjack poured out the drinks; that his memory was now getting clearer every minute. He remembers it was a square bottle because he never seen a bootlegger in Aberdeen with any other kind. He was certain Culjack had a quart bottle which wasn't full of moonshine. He did not recall whether he had been in any other places that evening and that in order to tell he would have to depend upon his notes. He could not state whether he had been in Silvers room that day or any other place. He went back to the place on November 22d and that Culjack was there again; that Mr. Nicholson came in. The witness was accompanied by Agent Robinson and Mr. Erickson. They asked Culjack for liquor and Culjack walked in the partitioned room and let them in. That he again had a quart bottle in his hand and served three drinks. That Agent Robinson bought the drinks amounting to seventy-five cents; that the witness then ordered a pint of moonshine. As he recalls it was around 8:30 P. M.; that he checked up on his notes so as to fix the time. The only conversation he had with Culjack

(Testimony of Dewey Harrison.)

was regarding the purchase of the half pint; that he paid \$1.00 for it and he never asked him his name; that he knew him by sight and that he had seen him many times with Danich down at the Midway; that Danich was also arrested at Aberdeen and that Danich and Culjack were partners because different men around town had told him so. When asked if he was just as sure of that fact as he was of the rest of his evidence he stated that he was not sure they were partners and that he was depending upon hearsay for the information. That he had seen them together several times. That he was not positive and was guessing at the fact that they had formerly been partners and was only [25—8] volunteering what he had heard. I think the first time I found out his name was Dave for certain was when he was arrested and his personal history taken. I cannot state positively when I first learned his name was Dave and I cannot fix the date when I positively knew that his name was Dave. That he participated in an arrest; that he walked into the Midway Cigar Store for Mike Danich and the defendant Culjack was there, and then corrected the name to be Victor Danich as his real Christian name. That he told Culjack to come along; that the Midway is a block away from the place where Culjack sold the intoxicating liquor. He told Culjack, "Come on, Dave; the marshal has got a warrant for you." I don't recall whether anyone else was present and I think we were in a car although I don't remember. We arrested so

(Testimony of Dewey Harrison.)

many that day I just recall I picked him out and picked him up. Mr. Savelle was driving the car. I don't remember whether a man named Shorter was there or not. I did not show him my badge. I did not pick him up on the street near the Midway Cigar Store but he was standing in the back of the Midway Cigar Store. I remember that distinctly because he was backed to me when I walked in, but I am not positive whether we had an automobile or not. I did not say, "You come on along," and open up my coat and show him my badge and then place him in the automobile and say, "Come on, we're going down to Aberdeen and pick up Dave and Mike." I am sure that I did not make that statement. I did not inquire of Savelle, "Who is this party?" pointing to Dave Culjack, or did I ask his name. I don't recall having told the Marshal, Mr. Vincent, to go and pick up Danich. I don't think I seen the warrant that Culjack was arrested on that night. The Marshal had a pocket full of warrants and I don't remember whether he served one or not. We took Culjack down to the Nudleman Building where the Commissioner was holding the hearings. I don't think we had a hearing then. I don't recall whether I arrested Nicholson or not. [26—9] I never had any dealings with Nicholson at any time. I first met Mr. Nicholson on the 22d of November when Agent Robinson and myself were in and purchased liquor from Culjack and Mr. Nicholson was present, I am positive of that because we were talking to him about fishing lines.



(Testimony of Dewey Harrison.)

I think I made the statement to Mr. Nicholson about Mr. Robinson. Yes, "the first thing he caught was a seagull," and they were arguing about some line Mr. Nicholson helped him fix up. I am quite sure this conversation took place as I recall. However, I am positive he was there. I don't recall saying anything else to him. I didn't talk to him about any liquor as we had previously purchased from Culjack. I don't recall anybody else speaking to Nicholson about liquor in my presence and I had never seen him prior to November 22d. I don't think he ever participated in any way in any sale or transaction. He was just in the place, that was all. He was present in a way, yet he wasn't. We bought our liquor in a little partitioned room and Nicholson was outside the room. We were not talking loud. He might have heard our conversation but I don't believe he could have because there was other men in there talking.

### TESTIMONY OF ERNEST G. ROBINSON, FOR THE GOVERNMENT.

ERNEST G. ROBINSON, having been first duly sworn as a witness on behalf of the Government, testified in substance as follows:

I am a Federal Prohibition Agent and had occasion to see the defendants on the third of November, 1930. Witness was then asked to tell when, where and what happened.

Mr. GARVIN.—I object to this, if your Honor

(Testimony of Ernest G. Robinson.)

please, under the same objection, as not being part of the charge, as counts two and three being stricken.

The COURT.—Objection overruled. [27—10]

Mr. GARVIN.—A misjoinder of the parties defendant, as to count four. Exception, if your Honor please.

The COURT.—Allowed.

WITNESS.—(Continuing.) The afternoon of November 3d, 1930, with Fritz Erickson, I went to the Aberdeen Cigar Store, and entered the place. There was some laboring man or some drifter that was sitting in there. There was nobody else in the place at the time. Mr. Erickson asked this fellow where the boss was, and this laborer said that Vick would be back in a minute. We waited a little while, and Mr. Nicholson,—

Mr. GARVIN.—Just a minute. I move to strike any conversation that he had, or may have had, with the third party here, as not binding on any of these defendants, not in their presence.

The COURT.—Well, you didn't object before he answered.

Mr. GARVIN.—I understood from the start of the testimony that one or the other of the defendants was present, when he comes to that portion they were not, then I objected.

The COURT.—The jury will be instructed to disregard what this man referred to as a conversation with a laboring man, or working man, anything he told the witness, unless it is shown it was within the presence of the defendant.

(Testimony of Ernest G. Robinson.)

Witness resumes: We waited a few minutes and Mr. Nicholson came into the room. Mr. Erickson asked him for some whiskey and he took us into this little side room, and Mr. Erickson purchased four drinks of moonshine whiskey and I purchased a half pint. After some conversation, general conversation, we left the place. On November 22d I went back there with Mr. Erickson and Agent Harrison and we entered the place, and Mr. Culjack and Mr. Nicholson were both present at that time. I spoke to Mr. Nicholson and went on into this same room with Mr. Culjack and Agent Harrison purchased a half pint of whiskey from Mr. Culjack, and I purchased four drinks of whiskey from Mr. Culjack. Mr. Nicholson was outside in the other part of the room. [28—11] I knew Mr. Nicholson as Vick. That was what I understood his name was. I subsequently heard there were other Vicks in that community. Witness identified Government's Exhibit Number Two as a "mickey" of moonshine whiskey. That he first saw it at the Aberdeen Cigar Store in the back room, the side room, in the afternoon of November 3d, last year; that he got it from Mr. Nicholson and it is the half pint about which he just testified; that it is intoxicating and capable of being used as a beverage, and contains more than one-half of one per cent of alcohol by volume.

Mr. Mallery offers Government's Exhibit Number Two in evidence.

Mr. GARVIN.—Same general objection. It is incompetent, irrelevant and immaterial; a mis-

(Testimony of Ernest G. Robinson.)

joinder of the parties defendant; and not binding upon anybody. We are making no objection to the custody or control. I admit that it has been in proper custody.

The COURT.—Nor identification?

Mr. GARVIN.—None.

The COURT.—Objection overruled. It will be admitted.

Witness ROBINSON on cross-examination testified as follows:

That he first saw Nicholson on November 3d, 1930, in the afternoon; I had known Erickson for some little time. I believe we had been in a number of places other than this that day, and for several days subsequent, too. That his memory was just that of an ordinary individual; that he has had considerable training as a police officer and has been a former sheriff and has also been in other Government service for a number of years and has come in contact with a number of people. That there was a possibility that he could have been mistaken about this transaction, in the confusion, and accumulation and multitude of transactions that he had there. That he issued the warrants in these cases. That he signed the complaint for the [29—12] original warrant and he gave the Commissioner the information from which he issued that warrant in which he had John Doe Vick and Culjack's name on; that he issued a number of warrants that day, some eighty or ninety, or somewhere in that neighborhood; that he was working on short time. That he knew Mr. Kinnaird and that he is the super-

(Testimony of Ernest G. Robinson.)  
vising agent, or something like that, in the Federal Prohibition Department and that he had authority to swear to a warrant or complaint at that time. That he issued this warrant for Dave Culjack and John Doe Vick, describing said John Doe Vick, and that the warrant was based on his personal recollection of Vic as he knew him at that time. That he knew Vic Danich as "Mike" Danich and did not ever hear of his name as "Vick" until after his arrest. (Mr. Garvin offers warrant in Danich case as Defendants' Exhibit Three.) That the warrant contains the words Mike and Vick written in in longhand and the name following is Danich; that the warrant is dated November 30, 1930, the day prior to the arrest. That the complaint, in the section where the defendant is charged, reads Mike Danich; that he doesn't know where the Vick came from, and doesn't believe Mr. Fitch wrote it in, and that the warrant was not altered in his presence at any time as he recalled. That he had no recollection or no knowledge of when the insertion in ink "Vick" was put in there; that he didn't recognize the handwriting of the insertion and that it wasn't his. That he was there on November 22d also and his transaction on that day was with Mr. Culjack, and Nicholson was present in the building, but Nicholson had absolutely nothing to do with the sale of liquor that day. That he was in Aberdeen and Hoquiam on December 1st, the day these men were arrested and doesn't recall if he was at the commissioner's

(Testimony of Ernest G. Robinson.)

office when Nicholson was brought *it*. That he had no recollection of being present at the time Kinnaird issued a complaint and had the warrant issued for Nicholson; that he had never heard him called Vick but that was his own impression as to what his name was. [30—13] That the handwriting on the bottle that he brought from Nicholson which says, "Vick, partner of Dave Culjack," is not his handwriting; that he never drank out of the bottle, did not analyze it himself, but knew it was whiskey; that he just took the cork out of the bottle and tasted it, is all.

(Government rests.)

Mr. GARVIN.—I have two motions to make at this time, whatever the Court desires to do in the matter, with regard to having the jury excused. Do you wish it in the presence of the jury?

The COURT.—Unless you urge the retirement of the jury, it will be all right.

Mr. GARVIN.—All right. No, your Honor. At this time both the defendants move the Court for a directed verdict of not guilty, and request that the jury be instructed to return a verdict of not guilty as to both defendants, on the ground and for the reason of insufficient evidence, and a misjoinder of the parties defendant; that as to count one and to count four, one being the sale count as being against Culjack, and four being the nuisance count as against both of these defendants, that there is insufficient evidence on either count to take this case to the jury.

The defendant Nicholson further moves the court for a directed verdict upon the grounds that there is no evidence at all, even under the scintilla theory, of taking this case to the jury as to him. I do not care to burden the court, you are probably more familiar than I am with the decisions of the court on the question of a nuisance; the only testimony there is in the case is the testimony of the last witness, who testified he went in there on the date of November 3d; that there was a third party in the place; that he had some conversation with him, and subsequent to that, that the defendant Nicholson came to that; that he went in the back room with him, and that he purchased two or three drinks, I wouldn't be exact as to the number, and this exhibit, I don't know which one that is. [31—14]

Under all the evidence, all the testimony, and the record in this case and all the decisions of the courts, if you Honor please, I honestly urge and sincerely urge that there is insufficient evidence on the nuisance count; there is no evidence in this record at all as to the place or located, other than it is at Aberdeen,—a cigar store. There is no proof offered on this count. There is no showing of any kind as to the ownership as between either one of these defendants. In other words, Nicholson might have been just going in there casually in to the place as I might have been going in, but under the charge here, he is maintaining a common nuisance, and I sincerely and honestly urge, as a matter of

(Testimony of Dave Culjack.)

law, that there is not sufficient evidence, or any evidence whatever, to carry this case to the jury, and the defendant is entitled to a dismissal at this time.

The COURT.—Motion denied.

Mr. GARVIN.—Exception, if your Honor please.

The COURT.—Exception allowed. The jury will understand that the court's ruling, you are not to jump at the conclusion the court has concluded that the evidence establishes the guilt of the defendants, but the court's ruling is simply to this effect: the questions in the case are questions of fact, for the jury to decide and not a question of law for the court to decide.

#### TESTIMONY OF DAVE CULJACK, ON BEHALF OF HIMSELF.

DAVE CULJACK, having been first duly sworn as a witness on behalf of himself, testified in substance as follows:

That his name was Dave Culjack; he had lived at Aberdeen for pretty near about ten years; that he is a married man, and his family consists of his wife and two children and he lives with his family at Aberdeen. I was just working at the cigar store known as the Aberdeen Cigar Store in the city of Aberdeen, and the first time [32—15] I went to work in there was October 21, 1930; any time when I was working I always remember the date. I hadn't worked since about June 2d, 1930, as I had kidney trouble and had an operation to have



(Testimony of Dave Culjack.)

one of my kidneys removed. That Forrest Nicholson was the owner of the cigar store known as the Aberdeen Cigar Store located at 316 South "G" Street, Aberdeen; that I had no financial interest of any kind in the place, I only worked there; that Mr. Nicholson was paying him \$150.00 a month. That he did not sell Mr. Harrison two ounces of intoxicating liquor on October 17th, 1930; that he never met him before the day of the arrest, December 1, 1930, when he arrested me at 311 South "F" Street. That he did not sell him any whiskey on November 22d; that he doesn't sell whiskey. That on November 3d (the date Mr. Harrison and Mr. Robertson testified they came to the place and Mr. Nicholson was there and Culjack came in later, and they had the transaction with Nicholson) he (Culjack) was in Portland and went down there to see his doctor; that he had a receipt received from his doctor, Dr. Johnson, that was dated November 3d, and that said date was the exact day he received it and was the exact day he was in Portland.

Mr. GARVIN.—I will offer that, if your Honor please, as corroborative testimony.

The COURT.—Admitted.

Mr. MALLERY.—Object to that as incompetent, irrelevant and immaterial. There is not testimony,—no allegation anywhere that this defendant Culjack was there on the 3d of November. It is not rebuttal of anything; it is confusing; it is a matter that will make the whole affair confusing.

(Testimony of Dave Culjack.)

Mr. GARVIN.—It is a matter of testimony that he came in later on that date.

Mr. MALLERY.—No contention at all of that.

Mr. GARVIN.—Your contending he wasn't on the premises [33—16] there on the 3d.

Mr. MALLERY.—No. There is no contention he was or wasn't there.

The COURT.—It will be admitted, even in view of your concession or statement. As far as the nuisance count is concerned, the defendant Culjack's association with Nicholson, being one of the elements in the fourth count, if you got him separated from Nicholson far enough and often enough, and with sufficient continuance, why, it would probably amount to an iron-clad defense. This would tend to show a separation at one time, at least. Objection overruled. It will be admitted.

The witness continues: That Mr. Nicholson had opened up the Aberdeen Cigar Store a couple of days before he started working; that he thought someone else had been in there four or five months prior; he wasn't quite sure. That he had been convicted for possession twice at Aberdeen in 1926 and 1927. That about a quarter after twelve on December first Mr. Nicholson came on the shift. That he (Culjack) worked in the morning from eight o'clock to twelve and from one to five; that when Nicholson came on the shift he went out to dinner; that he started out and went to "F" Street and saw Mr. Harris running from a car which was parked on the left-hand side going east but that he

(Testimony of Dave Culjack.)

didn't know who Harris was, and that he went into the Midway Cigar Store which is owned by Vick Danich; that Vick Danich had worked for him when he was sick about June 2d, 1930, and had worked about a year prior to that for him. That he had just got in by the stove when a man who was standing by the stool looked at him and Mr. Danich and told them to come along with him. When asked who he was he opened up his coat and showed his star and told them he was a federal agent. That he took Culjack over to the car which was being driven by Lee Savelle and Mr. Shorter was also in the car. That the deputy marshal brought Louie in the car and then Mr. Harris [34—17] told Lee Savelle to run down and pick up Charlie Hugg; Mr. Harris went inside and got Charlie Hugg and then told Mr. Savelle to run down to the Aberdeen Cigar Store and pick up Dave and Vick. When they got down there Mr. Harris went inside and pretty soon came back. He asked Savelle who that fellow was (pointing at Culjack) and Savelle told him that it was Dave Culjack and that he and Vick Danich were running this place and that on "F" Street. Mr. Harris told the marshal to go inside and pick up Vic. He told him going down there to the next place, "That is the American Pool Room" and the marshal went inside and got Mr. Nicholson and Mr. Harrison went down to pick another fellow up, and they took me down to the Commissioners.

On cross-examination he testified as follows: That he knew he wasn't there on October 17th because the.

(Testimony of Dave Culjack.)

place wasn't opened up; that he started working there on October 21st and had marked the date down in his book and remembered it; that he was arrested about a quarter after twelve while he was out at his noon hour. Defendant was then asked if he knew where Harrison had been before he came and arrested him.

Mr. GARVIN.—It is immaterial, and calling for a conclusion.

The COURT.—Objection overruled.

Mr. GARVIN.—Exception.

The COURT.—Allowed.

Whereupon witness answered that he did not know, that he had seen him running from the car.

#### TESTIMONY OF FORREST W. NICHOLSON, ON BEHALF OF HIMSELF.

FORREST W. NICHOLSON, having been first duly sworn as a witness on behalf of himself, testified in substance as follows:

That he lived at 219 Wright Street, Aberdeen, by himself, and his mother lives in Elma; that he is in the cigar business and [35—18] was formerly a cook in camps, but for the past couple of years has been working in a cigar store; that he had never been convicted of a crime. He bought the Aberdeen Cigar Store in the latter part of September, 1930, and that the place had been closed since July, 1930; that he remodeled the place and cleaned it up and built a room which he was going to change

(Testimony of Forrest W. Nicholson.)

into a kitchen as he was going to do the cooking and also built a lunch-counter in there; that he had carpenters helping him for about four or five days; that he opened the place on the 19th and was the sole owner of the business; that Culjack went to work for him on October 21st; that he is positive he did not open the place until the 19th; that he had never engaged in the liquor business in any way at any time prior to October 19th, and had no intention of buying into the liquor business when he bought this place; that he paid \$450.00 for it and bought supplies, making a total investment of about eight or nine hundred dollars; that he never sold any intoxicating liquor and never had any liquor there, and that there was no liquor there at any time from October 19th to the present time to the best of his knowledge; that he would not have permitted any intoxicating liquor to be sold upon the premises; that he is in the cigar and lunch-counter business. That about noon on December 1st he went to work to relieve Culjack and had just taken his coat and hat off and went to work when Mr. Harrison came in and asked where Dave was. He replied he didn't know as he was out some place. Mr. Harrison left and another man came in whom he latter understood was Mr. Vincent, and asked him if his name was Vick. He replied to the contrary. The marshal told him to put on his coat and hat, that he was the marshal, and pulled back his coat and showed him his star, and so he put on his coat and hat and went with him, after locking the place up; that there

(Testimony of Forrest W. Nicholson.)

was no liquor there at the time. That he then went down to the Commissioner's hearing and there were some eighty or ninety people there; they put part of them on one side of the [36—19] building and part on the other and everybody got mixed up. A short dark complected fellow said to him, "What can I do for you?" and he replied, "You can turn me out quicker than anything else." I resume he was an officer. He asked me what my name was; he had his files all put away and was getting ready to go home but he took his files out and couldn't find my name. Both Mr. Robinson and Mr. Harrison were present at that time and Mr. Kinnaird was there. They all walked around me and then Mr. Robinson came up and looked me over. Mr. Kinnaird then filed the complaint against me. A certified copy of the complaint is offered as Defendants' Exhibit "A-2."

Mr. MALLERY.—Objected to as immaterial and incompetent.

Mr. GARVIN.—It is a certified copy of the complaint.

The COURT.—I do not understand it is objected to because it is a copy. Objection overruled. It will be admitted.

Witness resumes: That he did not sell Mr. Robinson any bottle or drinks on November 3d or 22d and did not see him prior to the time he saw him at the Commissioner's hearing on December 1, 1931.

On cross-examination he testified as follows: That he was positive he opened up his place on

(Testimony of Forrest W. Nicholson.)

the 19th and that there was a new room built in there in which some stuff was stored, he thought a wheelbarrow, some chairs and a card table; that the room was not used to play cards in. There are two or three back rooms; there is a woodshed on one end and a sink and faucet and water; that he was going to put a kitchen in the place and had started to fix the place up but never finished it.

#### TESTIMONY OF FRANK FRANICH, FOR DEFENDANTS.

FRANK FRANICH, having been first duly sworn as a witness on behalf of defendants, testified in substance as follows:

That he lives at 601 West Boulevard South, Aberdeen, and have lived in Aberdeen since 1907, is a married man and has a family, has never been convicted of violating any law and has been a carpenter [37—20] since 1912; that during the month of September and October, 1930, he had occasion to work at the premises known as 316 South "G" Street; that he had worked there three days and was coming back later to finish it because he had to do some other work; that he finished the job October 18th; that he worked there the 16th, 17th and 18th; that the place was not open for business on October 17, 1930; that Mr. Nicholson hired him to do the work.

On cross-examination he testified: He started to work on the 19th; that he marked it on his time-

(Testimony of Frank Franich.)

book and exhibited the same; that he had a larger book at home; that he started to work on Wednesday; that he thought he gave Mr. Nichols a receipt as he did not pay him by check; that the windows in the cigar store were frosted at the time he was working there. The witness is handed a receipt which is dated October 18th, and he identified the signature as his and admits that it is the receipt about which he has been speaking; that he got paid the same day he finished the work.

#### TESTIMONY OF W. M. FULLER, FOR DEFENDANTS.

W. M. FULLER, having been first duly sworn as a witness on behalf of defendants, testified in substance as follows:

That he was a tobacco salesman with the West Coast Grocery with headquarters at Aberdeen and was working in Aberdeen in September and October, 1930, and is acquainted with the defendants in this case and with the business located at 316 South "G" Street, known as the Aberdeen Cigar Store; that he did not know the exact date the place was opened up for business; that he called on October 13th and Mr. Nicholson was there cleaning up the place and he got his first order from him; that he called on October 16th and the place was still closed and that the place was still closed on Saturday, the 18th; that on Monday he called and found Mr. Nicholson there; the place was dirty and Mr.



(Testimony of W. M. Fuller.)

Nicholson had been trying to clean it up; that the first order was delivered on the 13th and the [38—21] next one the following week; and that the place wasn't open for business on Saturday, the 18th; that Mr. Nicholson gave him the order on the 13th; that he saw Mr. Culjack after they had opened the place up for business, and that they were open on the 20th.

#### TESTIMONY OF W. J. KELLY, FOR DEFENDANTS.

W. J. KELLY, having been first duly sworn as a witness on behalf of defendants, testified in substance as follows:

That he is engaged in the garage business in Aberdeen and is acquainted with the defendant Nicholson and has known him for about five years; that his reputation for being a law-abiding, honest and truthful citizen is good.

#### TESTIMONY OF ED NESBIT, FOR DEFENDANTS.

ED NESBIT, having been first duly sworn as a witness on behalf of defendants, testified in substance as follows:

That he lives at Aberdeen and has known the defendant Nicholson for about seven or eight years and that he has been employed by witness; that he had charge of the business funds and money, and that his reputation for being a truthful and law-abiding citizen in Aberdeen is very good.

## TESTIMONY OF I. MECKLIN, FOR DEFENDANTS.

I. MECKLIN, having been first duly sworn as a witness on behalf of defendants, testified in substance as follows:

That he lives at Aberdeen and has lived there twenty-eight years and has been working for a logging company for the last thirteen years in the capacity of employing the help; that he has known Mr. Nicholson since 1917 and that his reputation for being a truthful and law-abiding citizen in the community in which he lives is very good.

Defendant and Government rest.

Mr. GARVIN.—At this time I renew all the motions that I made at the conclusion of the Government's case, as to a directed [39—22] verdict, as to both defendants, upon the same grounds and for the same reasons at that time.

The COURT.—Denied.

Mr. GARVIN.—And particularly urge the one as to Nicholson, as a matter of law.

The COURT.—Denied.

Mr. GARVIN.—Exception.

The COURT.—Allowed.

The COURT.—The prosecutor's closing argument will be heard at two o'clock. Gentlemen, you are excused until that time, but bear in mind during this recess and at all times the cautions heretofore given you the same as though they were repeated to you now at length in open court. You are

excused until two o'clock. Gentlemen, the counts one and four, as I recall, are the only ones submitted?

Mr. GARVIN.—Yes, if your Honor please.

The COURT.—Gentlemen, you are excused now until two o'clock. Court will be at recess until two o'clock.

(Recess.)

The COURT.—Call of the jury waived?

Mr. MALLERY.—Yes, your Honor.

Mr. GARVIN.—Yes, your Honor.

The COURT.—The record will show the jurors are all present. You may make your closing address.

(Whereupon closing argument by Government counsel was submitted.)

The COURT.—Gentlemen, you will take the indictment out with you at the conclusion of the Court's charge as to the law, and you will have it with you during your deliberations in the jury-room, and may refer to it as to the offenses alleged. There are four counts in this indictment. The defendants have been tried on the first and the last count, counts one and [40—23] four. Count one accuses the defendant Culjack of a sale of intoxicating liquor on the 17th of October. The other defendant is not being tried on that count; Culjack alone is tried on that count. Both defendants are tried on the fourth count, the nuisance count.

The defendants have entered pleas of not guilty. The entry by an accused of the plea of not guilty,

places the burden on the prosecution of establishing by evidence beyond a reasonable doubt, the truth of every material allegation of the accusation on which he is being tried, and if the jury have a reasonable doubt concerning any material allegation of the count you are considering as touching the defendant you are considering, it is your duty to give the defendant the benefit of that doubt and acquit him. If you have no reasonable doubt, it is your duty to convict.

The allegations of the first count touching the date, the 17th of October,—now, if a criminal transaction, or the criminal act for which the defendant Culjack is there tried, if you are convinced that every material allegation being true,—convinced by the evidence beyond a reasonable doubt, save and except as to whether it occurred on the 17th of October or not; but you are convinced beyond a reasonable doubt that it occurred about that time, it is your duty to convict, although you may question its having occurred on the 17th of October. But, if the prosecution's witnesses have been mistaken about that, that is something that you can take into account in weighing the evidence and measuring the credit to be given their testimony. Where one is shown to be mistaken, why, the less credit you may reasonably attach to other portions of his testimony, in which there may not have been express evidence he was mistaken.

The nuisance count, the allegation there is that these defendants have maintained a common nuisance at this place from about the 17th of October

to the 22d of November. It describes this place where it is alleged the common nuisance was maintained by them. [41—24]

Again the period of time that they are accused of maintaining this common nuisance is not a material allegation in the sense that it has to be shown that it covered all of that time. If they sold or kept intoxicating liquor of the description given in this fourth count of the indictment, at that place, they would be guilty, even though it was for a shorter period of time than that stated.

The court has instructed you in numerous other cases concerning a nuisance. This law provides that any room, building or place where intoxicating liquor of the character here described is sold or kept is a common nuisance, and any person who maintains such a nuisance, is guilty of a misdemeanor. The words there used are to be understood by you in their common, ordinary meaning.

The law provides that not only is a person who directly commits an act made an offense by any law of the United States, a principal offender, but any person, who aids, abets, counsels, commands, induces or produces the commission of such an act, is likewise a principal offender.

It makes no difference,—no particular difference, whether the accused is an employee or whether he is the employer. If they are together engaged in each doing their part in maintaining such a nuisance as this here described in the indictment, why, in the eyes of the law, so far as the criminal branch of the law is concerned, they are equally responsible.

No presumption arises against either of these defendants because of the fact they have been indicted, nor because of the fact that they have been brought to trial before you. Every presumption of law is in favor of their innocence. This presumption of innocence continues with them, as it does with every accused person, from the beginning of the prosecution, throughout its progress, up until the time that the evidence admitted by the court upon the trial, becomes so strong as to break down and overcome that presumption of innocence, [42—25] and shows beyond a reasonable doubt the truth of every material allegation of the accusation on which they are being tried.

You will consider each count of the indictment separately.

You are in this case as in every case where questions of fact are tried to a jury, the sole and exclusive judges of every question of fact in the case, and the weight of the evidence and the credibility of the witnesses.

The court has repeatedly instructed you as to some of the different things you should take into consideration in measuring the credit of the testimony of a witness. The court has not meant to imply, or give you to understand, that those were the only things that you should take into account, because one of the reasons that twelve men are called upon to try cases of this kind, is that they have had different experiences, and each one of you may have some advantage over all the other members of your body, in determining some particular phase of the case. That is one of the reasons that a considerable

number of men are called into the jury-box to try questions of fact, and you should take into account all that you have found to be safe and reliable, in determining where the truth lies in a human transaction, and measuring the credit of the witnesses.

In this case the defendant Culjack admitted two prior convictions. Now, you are not in this case, to convict him on less evidence, because of the fact of those prior convictions, than you would otherwise require. If he had not taken the stand and testified in his own behalf, the prosecution would not have been allowed to show that, but when he took the stand and testified, why, he subjected himself to all the rules that are applicable to a witness, in determining the credit you are going to give his testimony; and one of those things is that any witness may be shown to have been convicted of an offense, as a circumstance bearing on the credit you are going to give to his testimony. There is no other way in which you [43—26] have a right to consider it.

Witnesses took the stand and testified that in the community where this other defendant said he resided, that he had a good reputation as a law-abiding citizen. Now, you are not to acquit him in this case, if you are from the evidence convinced beyond a reasonable doubt of his guilt. But, where a person is being tried for an offense, the law permits him to show, if he can do so, by a fair preponderance of the evidence, that he has had a good reputation as a law-abiding citizen. That is permitted to be shown as a circumstance that the jury will take

into account along with all the other evidence in the case, and if, under all the evidence, including that of his good reputation, you are convinced beyond a reasonable doubt of his guilt you should convict. But, if you have under all the evidence, including that of good reputation, a reasonable doubt concerning his guilt, it is your duty to acquit, even though you would have had no such doubt, but for the evidence of his good reputation.

Anything further, Gentlemen?

Mr. GARVIN.—I do not have anything further, if your Honor please. I would like to except to your first instruction, in which you say that the date of October 17th is not material. I feel in this particular case it is a material allegation. I want to call the court's attention to it, by reason of the testimony of other witnesses, that it wasn't opened up until Sunday, the 19th. I believe,—I think it is material, in the sense of the alibi that has been offered,—that date.

The COURT.—Exception allowed.

Mr. GARVIN.—And if your Honor please, with reference to your instruction as to maintaining a common nuisance, I except to that instruction, and particularly to that portion of it in which your Honor instructed the jury that it did not need to continue all of that time; that the mere keeping of intoxicating liquor, or selling [44—27] it, would be enough—would be sufficient to justify a verdict of guilty, to that portion of it, on the idea that,—

The COURT.—(Interrupting.) Let me inter-



rupt you. You overlooked one part of the instruction. That is, the court said if a lesser length of time than that alleged in the fourth count.

Mr. GARVIN.—But, if your Honor please, I feel the instruction is confusing by reason of the fact that the mere sale of liquor itself, wouldn't be sufficient to convict on.

The COURT.—The court did not instruct that it would.

Mr. GARVIN.—I appreciate that, but may I have an exception to that?

The COURT.—Exception allowed.

Mr. GARVIN.—I know I haven't got it in your language, because I took it down in longhand, and didn't get the court's exact words.

The COURT.—The instruction was in effect, that the prosecution was not under the burden of establishing that it continued to be a common nuisance throughout the entire period alleged; that was the essence of it. Anything further?

Mr. GARVIN.—I still want an exception, even so.

The COURT.—Exception allowed.

Mr. GARVIN.—And, if your Honor please, with reference to that instruction in which you instructed about aiding and abetting. The substance, toward the latter end of it, where you instructed the jury that if one person was there, irrespective of his relation, and liquor was sold, that he would be guilty; I feel that your Honor left out the element of knowledge. In other words, intent to maintain the place, as an element of the crime.

The COURT.—Yes, Gentlemen. Anyone aiding, —anyone might ignorantly aid another in committing an offense. You might, if someone handed you a sealed letter, it might be a part of the conspiracy; [45—28] It might be obscene. You might take it down here and innocently mail it without knowing anything about what is in it, and when the Court instructs you that anyone who aids, abets, counsels, commands, induces or procures the commission of a criminal act, it means knowingly, intentionally.

Anything further?

Mr. GARVIN.—That is all, if your Honor please.

The COURT.—Is a sealed verdict agreed to in case the jury agree after five o'clock?

Mr. GARVIN.—Yes, if your Honor please.

This and the foregoing twenty-eight pages are hereby settled and certified as the bill of exceptions upon appeal in this case.

Signed at Tacoma this 11th day of May, 1931.

EDWARD E. CUSHMAN,

District Judge.

[Indorsed]: Filed May 11, 1931. [46—29]

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### ASSIGNMENTS OF ERROR.

*Come* now the defendant Dave Culjak herein and in support of *their* petition herein for an appeal *submit* that manifest errors were committed in that judgment of the court entered on the 9th day of March, 1931, in the above-entitled cause in the following particulars:

I.

The court erred in overruling the demurrer to the indictment.

II.

The court erred in refusing to quash the indictment.

III.

The court erred in allowing the Government's witnesses to testify as to transactions occurring on the 22d day of November, 1930, which was objected to by the defendant and an exception allowed.

IV.

The court erred in admitting the Exhibit No. 1 over the objection of the defendants, to which an exception was allowed.

V.

The court erred in allowing the Government witnesses to testify as to the alleged transaction of November 3, 1930, which [47] was objected to by the defendant and an exception allowed.

VI.

The court erred in admitting Government's Exhibit No. 2, objected to by the defendant and an exception allowed.

VII.

The court erred in refusing to grant the motions of the defendants for a directed verdict of not guilty on Counts I and IV at the conclusion of the Government's case.

VIII.

The court erred in refusing to grant the defend-

ant's motion for a directed verdict which was renewed at the conclusion of all of the testimony and evidence at the trial.

## IX.

The court erred in giving the following instruction:

“The allegations of the first count touching the date, the 17th of October,—now, if a criminal transaction, or the criminal act which the defendant Culjack is there tried, if you are convinced of every material allegation of that being true,—convinced by the evidence beyond a reasonable doubt, save and except as to whether it occurred on the 17th of October or not; but you are convinced beyond a reasonable doubt that it occurred about that time, it is your duty to convict, although you may question its having occurred on the 17th of October. But, if the prosecution's witnesses have been mistaken about that, that is something that you can take into account in weighing the evidence and measuring the credit to be given their testimony. Where one is shown to be mistaken, why, the less credit you may reasonably attach to other portions of his testimony, in which there may not have been express evidence he was mistaken.”

## X.

The court erred in giving the following instruction:

“The period of time that they are accused of maintaining this common nuisance is not a

material allegation in the sense that it has to be shown that it covered all of that time. If they sold or kept intoxicating liquor of the description given in this fourth count of the indictment, at that place, they would be guilty, even though it was for a shorter period of time than that stated. [48] The Court has instructed you in numerous other cases concerning a nuisance. This law provides that any room, building or place where intoxicating liquor of the character here described, is sold or kept, is a common nuisance, and any person who maintains such a nuisance, is guilty of a misdemeanor. The words there used are to be understood by you in their common, ordinary meaning.”

## XI.

The court erred in overruling the defendants' motion for a new trial.

WHEREFORE the defendant *pray* the judgment of said court be reversed and this cause be remanded to the said District Court and such directions be given that the alleged errors may be corrected and law and justice done in the matter.

H. SYLVESTER GARVIN,  
Attorney for Defendants.

Received a copy of the within assign. of error this 23 day of March, 1931.

JOHN T. McCUTCHEON,  
Attorney for \_\_\_\_\_.

[Indorsed]: Filed Mar. 23, 1931. [49]

## PETITION FOR APPEAL.

Comes now the defendant Dave Culjak herein, and having heretofore filed in the above-entitled cause his assignments of error, and hereby *give* notice of appeal that he appeals to the Circuit Court of Appeals for the Ninth Circuit, from the judgment and sentence of this court entered on the 9th day of March, 1931, based upon the verdict of the jury finding the defendant Guilty on Count IV as charged in the indictment and the said defendant respectfully *pray* this court that his appeal be allowed.

H. SYLVESTER GARVIN,  
Attorney for Defendants.

Received a copy of the within this 23 day of March, 1931.

JOHN T. McCUTCHEON,  
Attorney for \_\_\_\_\_.

[Indorsed]: Filed Mar. 23, 1931. [50]

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## ORDER ALLOWING APPEAL.

Upon the petition for appeal of the defendant Dave Culjak the assignments of error having heretofore been filed by the said defendant,—

IT IS ORDERED, that the appeal be and the same is hereby allowed.

Done in open court this 23d day of March, 1931.

EDWARD E. CUSHMAN,  
United States District Judge.

Received a copy of the within order this 23 day of March, 1931.

JOHN T. McCUTCHEON,  
Attorney for \_\_\_\_\_.

[Indorsed]: Filed Mar. 23, 1931. [51]

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CITATION ON APPEAL.

United States of America,—ss.

The President of the United States of America, to the United States of America, and to ANTHONY SAVAGE, United States Attorney for the Western District of Washington, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, within thirty (30) days from the date hereof, pursuant to an appeal filed in the Clerk's office of the District Court of the United States for the Western District of Washington, Southern Division, wherein Dave Culjak is the appellant and the United States of America is the appellee, to show cause, if any there be, why the judgment in the said appeal mentioned should not be corrected and speedy justice should not be done on that behalf.

WITNESS the Honorable EDWARD E. CUSHMAN, Judge of the District Court of the United States for the Western District of Washington, Southern Division, this 23d day of March, 1931.

EDWARD E. CUSHMAN,  
United States District Judge.

Received a copy of the within citation this 23 day of Mar., 1931.

JOHN T. McCUTCHEON,  
Attorney for ————. [52]

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### BOND ON APPEAL.

KNOW ALL MEN BY THESE PRESENTS: That we, Dave Culjak, as principal, and M. M. Bender and Kata Bender, husband and wife, and Ivan Puhich, as sureties, are held and firmly bound unto the United States of America in the full and just sum of Fifteen Hundred Dollars (\$1500.00), to be paid to the United States of America, to which payment well and truly to be paid, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 1st day of April, in the year of our Lord one thousand nine hundred thirty-one.

WHEREAS, on the 9th day of March, 1931, in the District Court of the United States, for the Western District of Washington, Southern Division, in a suit pending in said court, between the United States of America, plaintiff, and Dave Culjak and Forrest W. Nicholson, defendants, a judgment and sentence was rendered against the said Dave Culjak, and the said Dave Culjak has appealed to the United States Circuit Court of Appeals for the Ninth Circuit to reverse the judgment and sentence in the aforesaid suit, and a citation directed to the



said United States of America, citing and admonishing the United States of America to be and appear in the Ninth Circuit at the City of San Francisco, State of California, thirty days from and after the date of said citation, which citation [53] has been duly served.

Now, the condition of the above obligation is such that if the said Dave Culjak shall appear, either in person or by attorney, in the United States Circuit Court of Appeals for the Ninth Circuit, on such day or days as may be appointed for the hearing of said cause, in said court, and prosecute his said appeal, and abide by and obey all orders made by said courts or the Supreme Court pursuant to such appeal, surrendering himself in execution of the sentence imposed, when ordered, if the judgment is affirmed, and appearing for retrial when ordered if the judgment is reversed, then the above obligation to be void; otherwise to remain in full force, virtue and effect.

DAVE CULJAK,  
Principal.  
M. M. BENDER,  
KATA BENDER,  
IVAN PUHICH,  
Sureties.

[Indorsed]: Approved.

EDWARD E. CUSHMAN,  
District Judge.

United States of America,  
 Western District of Washington,  
 Southern Division,—ss.

M. M. Bender and Kata Bender, his wife, who are the within sureties on the annexed bond and recognizance, being both duly sworn, upon oath depose and state: That they reside at Montesano, in the County of Grays Harbor, State of Washington, in the Western District of Washington, Southern Division, and that they are freeholders in the Western District of Washington in said district; that [54] they are worth the sum of \$1500.00 over and above all of their just debts and liabilities in property subject to execution and sale and that such property consists of real estate described as follows, to wit: Lots one (1) and six (6), block two (2), Coverly's Addition to Montesano, Washington; the reasonable worth and value of said property is \$5,000.00 and the same is free of encumbrances and that any and all homestead rights in the said property are hereby waived.

M. M. BENDER.

KATA BENDER.

United States of America,  
 Western District of Washington,  
 Southern Division,—ss.

On this day personally appeared before me M. M. Bender and Kata Bender, his wife, who being each first duly sworn upon oath and to me known to be the individuals described in and who executed the within and foregoing instrument, and acknowl-

edged that they signed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and seal this 1st day of April, 1931.

[Seal]

CHAS. W. SMITH,  
United States Commissioner.

United States of America,  
Western District of Washington,  
Southern Division,—ss.

Ivan Puhich, who is the within surety on the annexed bond and recognizance, being duly sworn, upon oath deposes and states: That he resides at Montesano, in the County of Grays Harbor, [55] State of Washington, in the Western District of Washington, Southern Division, and that he is a freeholder in the Western District of Washington in the said district; that he is worth the sum of \$1500.00 over and above all his just debts and liabilities in property subject to execution and sale and that said property consists of real estate described as follows, to wit: Lots one (1) and two (2), block one (1) of Blair's Addition to Montesano, the same being separate property; the reasonable worth and value of said property is \$3500.00 and the same is free of encumbrances and that any and all homestead rights in the said property are hereby waived.

IVAN PUHICH.

United States of America,  
 Western District of Washington,  
 Southern Division,—ss.

On this day personally appeared before me Ivan Puhich, who being first duly sworn upon oath, and to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and seal this 1st day of April, 1931.

[Seal]

CHAS. W. SMITH,  
 United States Commissioner. [56]

United States of America,  
 Western District of Washington,  
 Southern Division,—ss.

On this day personally appeared before me Dave Culjak, who being first duly sworn upon oath, and to me known to be the individual described in and who executed the within and foregoing instrument, and acknowledged that he signed the same as his free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and seal this 1st day of April, 1931.

[Seal]

CHAS. W. SMITH,  
 United States Commissioner.

Tax receipts for the year 1929 presented to the Commissioner and notation made thereon that the property therein is pledged on this bond.

[Seal]

CHAS. W. SMITH,  
U. S. Commissioner.

Approved:

CHAS. W. SMITH, (Seal)  
U. S. Commissioner.

Approved:

\_\_\_\_\_,  
U. S. District Judge.

[Indorsed]: Filed Apr. 4, 1931. [57]

AMENDED PRAECIPE FOR TRANSCRIPT OF  
THE RECORD.

To the Clerk of the Above-entitled Court:

Will you please prepare and certify a transcript of record upon appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause and include therein the following papers and proceedings. You may eliminate all captions except in the indictment:

1. The indictment.
2. Arraignment of defendant.
3. Demurrer.
4. Motion to quash.
5. Journal entries overruling demurrer and motion to quash, noting exceptions to the defendant.
6. Plea of the defendant.
7. Judgment and sentence of defendant.

8. Motion for new trial.
9. Journal entry overruling motion for new trial and noting exception.
10. Assignments of error.
11. Petition and order for appeal.
12. Citation on appeal.
13. Bond on appeal. [58]
14. Order extending time for appellant to prepare his record and lodge his appeal.
15. Clerk's certificate.
16. Verdict of the jury.
17. Certified bill of exceptions.
18. Amended praecipe for transcript of the record.

H. SYLVESTER GARVIN,  
Attorney for Defendant,  
955 Dexter Horton Building,  
Seattle, Washington.

[Indorsed]: Filed Apr. 30, 1931. [59]

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CERTIFICATE OF CLERK U. S. DISTRICT  
COURT TO TYPEWRITTEN TRAN-  
SCRIPT OF RECORD ON APPEAL.

United States of America,  
Western District of Washington,—ss.

I, Ed M. Lakin, Clerk of the District Court of the United States for the Western District of Washington, do hereby certify and return that the foregoing typewritten transcript of record consisting of pages numbered from one to sixty, inclusive, are

a full, true and correct copy of so much of the record, papers and proceedings in Cause No. 14,304, United States of America, Plaintiff, versus Dave Culjak et al., Defendants, as is required and shown by praecipe of counsel filed and shown herein, and as the originals thereof appear on file and of record in my office at Tacoma in said District, and that the same constitutes the record on appeal from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that I hereto attach and herewith transmit the original citation in this cause with acceptance of service thereon.

I further certify that the following is a full, true and correct statement of all fees and charges incurred, and paid by and on behalf of appellant herein for making the record of appeal, certificate and return to the United States Circuit Court of Appeals for the Ninth Circuit, to wit:

Clerks' Fees (Act Feb. 11, 1925) for making record, 130 fols/@ 15¢ ea. ....	\$19.50
Appeal .....	5.00
Seal .....	.50

IN TESTIMONY WHEREOF, I have caused the seal of said Court to be hereunto affixed at the City of Tacoma, in the Western District of Washington, this 12th day of May, A. D. 1931.

ED M. LAKIN,  
Clerk.

Alice Huggins,  
Deputy Clerk. [60]

[Endorsed]: No. 6469. United States Circuit Court of Appeals for the Ninth Circuit. Dave Culjak, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the Western District of Washington, Southern Division.

Filed May 15, 1931.

PAUL P. O'BRIEN,  
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.